

**In the matter of the *Fishing Industry Collective Bargaining Act*, hereinafter referred to as the “*Act*” and an application by the Fish, Food and Allied Workers requesting that the Standing Fish Price-Setting Panel reconsider its decision of April 2<sup>nd</sup>, 2015, setting price and conditions of sale for the species crab pursuant to Section 19.14 of the *Act*.**

The Standing Fish Price-Setting Panel, hereinafter referred to as “the Panel”, released its decision on the request for reconsideration on May 2<sup>nd</sup>, 2015. In its decision, the Panel accepted the request for reconsideration and the final offer of the Fish, Food and Allied Workers, hereinafter referred to as the “FFAW”. The Panel also advised that it would issue a more detailed report on its decision at a later date.

The Panel noted in its decision dated May 2<sup>nd</sup>, 2015, the time limits stipulated in the Act and Regulations, and the fact that the Panel’s decision must be made within 48 hours. The Panel also noted that the Act requires that final offer selection must be used. The request from the FFAW was received by the Panel on the afternoon of April 30<sup>th</sup>, 2015. The Panel advised the FFAW, and the Association of Seafood Producers, hereinafter referred to as “ASP”, that it would convene a hearing of the parties involved in the Panel’s decision of April 2<sup>nd</sup>, 2015, on Friday, May 1<sup>st</sup>, 2015, at 2:00pm at the Labour Relations Board Hearings Room.

The representatives of the FFAW and ASP appeared before the Panel and supported written submissions in main argument and rebuttal.

The Panel accepted the request for reconsideration and the final offer of the FFAW. Due to the time constraint, the Panel released its decision to the parties at 12:00pm on May 2<sup>nd</sup>, 2015, without reasons, but did advise the parties that a more detailed report on its decision would be issued.

The first issue the Panel was required to address was whether or not the request for reconsideration of the Panel’s decision of April 2<sup>nd</sup>, 2015, met the requirements of the Act and the Regulations. Given the time constraints, the Panel heard the parties on the preliminary objections, and the merits of the case at the same time. ASP argued that the request for reconsideration should be denied for: “*failing to meet the legislated and regulated provisions for price reconsiderations.*” Specifically, the request did not meet the requirements of the Act and the Regulations.

The Act stipulates, Section 19.14(3), the Panel “shall only” reconsider its decision:

- (a) *where it believes the failure to do so would jeopardize the conduct of the fishery to which its decision applies; and*
- (b) *where the criteria for reconsideration prescribed in regulations made under paragraph (4)(a) have been met.*

The Regulations Section 3(1) state:

*"In determining whether the conduct of the fishery to which its decision applies is in jeopardy under section 19.14(3) of the Act, the Panel shall consider whether market or currency factors have changed significantly from the time the Panel made its initial decision".*

ASP contended that since the date of the Panel's decision, the Urner Barry price index for crab has been going down, from \$5.15 to \$4.85. Furthermore, it is contended that the downward trend will continue. All of this does not support an upward revision in the price paid to harvesters should the FFAW position be accepted.

ASP also references the variations in the exchange rate between the US and Canadian dollar. Variations in the currency are addressed in the collective agreement between the parties. Adjustments to the price to harvesters as a result of that agreement are not part of any consideration for the Panel. The FFAW comments at p. 3 of its submission: *"In this reconsideration request, jeopardy is focusing on market changes, not currency."*

The preliminary issue for the Panel is whether the market factors have changed significantly from the time the Panel made its initial decision. The Panel decision on April 2<sup>nd</sup>, 2015, in relation to market prices, was based on the detailed analysis and projections in the two market reports. In arriving at its decision, the Panel was not applying the current market price at that time. Based on the information available at the time, the Panel had a view on where, most likely, market prices would level out. The range of projections in the market reports are quite broad and, as the Panel noted at the time, provided no assistance to the Panel to determine, with any precision, which final offer was more correct than the other.

The Panel was clear at p. 5 in its report that prospects in 2015 for both harvesters and processors were: "relatively good"; the other factor was the trend in market prices from the previous year, "...market prices year over year are trending down". The downward trend in market prices was not related to a specific price, it was an acknowledgement that the end result of the 2015 season over the 2014 season was that the market prices would be lower. It was also apparent that declines in the overall level of market prices would be offset by the dramatic change in the exchange rate. In fact, the ASP final offer was higher than the agreed settlement in 2014. As noted, any changes with respect to currency are provided for in the collective agreement.

The issue for the Panel, in the context of the regulations, is whether there has been a significant change in market prices since the time of the Panel's initial decision. That is a change from what the Panel had concluded to be the average market price for the season. The Panel outlined its view on the rights of the parties to a reconsideration, in response to the FFAW expressions of having to deal with an "unequal system" and "...reconsideration is a privilege essentially confined to the processors". In part, the Panel stated at p. 4:

*"The Panel determines the market prices on which it based its initial decision. The Panel then can compare that price or range of prices to new price levels, at a subsequent time, whether up or down. If the Panel can conclude that the change is significant and decide a lower price is more appropriate than surely it can make a similar decision if the price is higher".*

In the present case, the principles stated above can be applied even though the facts are different from what may have been contemplated. Since the Panel made its decision the price index has declined as expected, however at the end of the first month, the price levels still support a harvesters price of \$2.45. In other words, at the time of the Panel's decision on April 2<sup>nd</sup>, 2015, there was really no argument that the market return supported the price offer of \$2.45 by the FFAW. As the Panel noted at p. 2 of its decision on April 2<sup>nd</sup>, 2015: "...the parties and the Panel have had to settle on a price that would apply throughout the season..."

As the price declines, towards the average for the season, harvesters are in effect not getting an appropriate share. Again, a market price of \$4.85 could well support a \$2.45 price to harvesters. The issue for the Panel is to determine the average market price in 2015.

The FFAW request for a reconsideration is based on the premise that the lower market prices projected have yet to materialize: "...the FFAW is seeking a reconsideration of a price that was based on a lower market return that did not materialize." They go further to state that the lower market prices anticipated: "have not and will not materialize in 2015." To support their argument that price adjustments occur early in the season they cite the drops in 2012, 2013 and 2014, as evidence that the early price drops did not change in those years. Landings this year up to now are slightly higher than those in 2014.

The FFAW submission is that current price levels are a significant change from what the Panel must have concluded from the market reports. As a result, current price levels, which they think will stay in place, can support a \$2.45 price to harvesters.

The Panel has reviewed the particulars of the FFAW submission, their calculation of prices, and their assumptions of what the Panel must have had in mind with respect to market prices in 2015. The Panel does not necessarily accept or endorse all of the calculations and assumptions made by the FFAW, but does accept the conclusion that current price levels are a significant change from the contemplated average price for 2015.

The essential point for the Panel is that the parties, subject to the Act and Regulations, are treated in a fair and even handed manner. The Legislature, having removed the right to strike or lockout, must have intended that the parties, subject to the Act and Regulations, would have equal rights, obligations and benefits.

Harvesters are aware that market prices at the start of the season and throughout the first month could support a price to them of \$2.45. The Panel has no difficulty in accepting that fact and it would not be surprised if ASP accepted that fact. However,

ASP said the harvesters price must be related to some lower level of market returns which will better reflect the overall change in prices from year to year. The Panel, and the parties, are agreed on this point.

The FFAW has one opportunity to request a reconsideration on price, they have waited for a month in anticipation of the price decreases. During that month, harvesters have arguably lost out on what would be a fairer share of the market return. The longer they wait, the greater the loss. ASP, on the other hand, is in a position to benefit over the period of the initial market price decline and seek relief when the market return does not provide a sufficient margin.

In the FFAW's view, the market prices have likely leveled off. If they are right, they have a right to a reconsideration and the price proposal is not out of line. If they are wrong, and prices continue to drop, ASP having benefited through the first month or longer, have the right to request a reconsideration based on a continuing decline in the market price. This could result in their current final offer being restored or an even greater downward price adjustment, dependent on circumstances at the time.

The Panel is acutely aware of the anomaly created in accepting the FFAW position, prices to harvesters are increased even though market returns have declined since the date of its original decision. There is no doubt in the mind of the Panel, that if the market price drops to date were all that were contemplated for 2015, it would have accepted the FFAW proposal in its initial decision.

By granting the reconsideration, the harvesters have the benefit, going forward, of the market returns which are within the upper ranger of the market projections. If market prices remain in this area, no harm is done. If market prices do decline, the Panel can accommodate ASP with respect to changed circumstances. Again, no harm done. There is at least the element of fairness and equity in the treatment of both parties under the Act and Regulations.

The Panel could end its rationale for its decision at this point, but there are other elements which deserve consideration when it comes to pricing crab.

Final offer selection implies that the parties having bargained in good faith, and having gotten as close as possible to the final position, request the arbitrator to pick one of the two final offers. This is usually done on the basis of who is closest to the most reasonable point between the two. That is not what happens with respect to crab pricing. There are no tools available to the Panel to determine which is the better or more reasonable of two final offers that are 11¢ apart, a swing of 5.5¢ either way from the mid point. The Panel has to rely on projections of market prices which, while well reasoned and quite detailed, leave a range of 50¢ to 75¢. Added to this is the effect of currency. A market price change of 10¢ with currency applied, can obliterate the differences between two final offers.

When it comes to the harvesters share of the market return, the parties are not agreed. There is no agreement on yield. The Panel is directed by the parties to look at changes in market returns from year over year to determine the issue of which offer to accept.

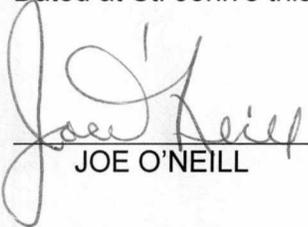
The other factor is that of minimum price, the price set by the Panel, in accordance with the collective agreement. Bonus payments over the minimum price have been a part of the crab fishery for more than 30 years. In its submission to the Panel at the beginning of the season, the FFAW made reference to the bonus system alleging they are not paid consistently and unequal payments are made to harvesters. The FFAW urged the Panel to consider likely bonus payments and the likelihood that they will be inequitably applied. They wanted the minimum price to be closer to the real price paid for crab.

The Panel rejected the argument as set out in its April 2<sup>nd</sup>, 2015 decision at p. 2 and 3. However, the fact remains that bonus payments are at times multiplies of the cents per pound difference between the positions of the two parties in their final offers to the Panel. This begs the question of what is the real value of the product being landed and what is the appropriate share to harvesters from the market return.

The effect is to make a mockery of the process in collective bargaining on crab prices, in the eyes of many involved in the fishery and, as well, the role of the Panel in setting the price based on the offers presented. At the present time, there is little respect for the Panel and the process in the setting of crab prices. If these issues are not properly addressed, the issue of "jeopardy" in the crab fishery may well be realized in the ordinary meaning of that term.

The Panel decision on the request for reconsideration is as reported in its decision of May 2, 2015.

Dated at St. John's this 5<sup>th</sup> day of May, 2015.

  
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JOE O'NEILL

  
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